

STRATA BY-LAWS FUNDAMENTALS

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1. INTRODUCTION

1.1 This seminar is aimed at all levels of practitioners from solicitors seeking an introduction to strata by-laws to more experienced practitioners wishing to refresh their knowledge and skills in this area of law.

1.2 In the time allowed, I will examine the following:

- The nature of by-laws;
- How to identify which by-laws apply to a strata scheme;
- The nature of exclusive use and special privilege by-laws;
- The matters to consider when drafting exclusive use and special privilege by-laws;
- Some of the common traps encountered when drafting by-laws and some useful tips on how to avoid them; and
- Recent case law relevant to by-laws.

1.3. In this paper, the term:

- **“EPAA”** is a reference to the *Environmental Planning and Assessment Act 1979* (NSW);
- **“LPI NSW”** is a reference to Land and Property Information NSW;
- **“SSMA”** is a reference to the *Strata Schemes Management Act 1996* (NSW);
- **“SSFDA”** is a reference to the *Strata Schemes (Freehold Development) Act 1973* (NSW);
- **“SSLDA”** is a reference to the *Strata Schemes (Leasehold Development) Act 1973* (NSW); and
- **“SSMR1997”** is a reference to the *Strata Schemes Management Regulation*

1997 (NSW); and

- “**SSMR2005** is a reference to the *Strata Schemes Management Regulation 2005* (NSW); and
- “**STA**” is a reference to the *Strata Titles Act 1973* (NSW).

2. NATURE OF BY-LAWS

General

2.1 By-laws are rules or laws established by an owners corporation which:

- operate as a statutory contract between each owner, mortgagee in possession, covenant chargee in possession, lessee and occupier in the strata scheme;
- govern the relationship between the owners corporation and the residents of lots in the strata scheme; and
- regulate the behaviour of residents in the strata scheme, the use of lot and common property, the maintenance and repair of lots and common property and facilitate the administration of the strata scheme.

What can by-laws deal with?

2.2 By-laws may be made to cover a broad range of matters. Some of the matters are listed in section 43(1) of the SSMA, being:

- safety and security measures;
- details of any common property of which the use is restricted;
- the keeping of pets;

- parking;
- floor coverings;
- garbage disposal;
- behaviour;
- architectural and landscaping guidelines to be observed by lot owners; and
- matters appropriate to the type of strata scheme concerned.

2.3 Section 43(2) of the SSMA states that the list of matters for which by-laws may be made is not limited. In practice, I have seen by-laws which:

- prohibit smoking on common property;
- authorise renovation works to a lot and common property;
- authorise upgrades in technology, e.g. the installation of solar panels, satellite dishes and Pay TV services;
- prohibit the use of garden boxes as balconies;
- subject to section 28 of the EPAA, prohibit the use of lots as brothels and massage parlours; and
- the electronic service of meeting notices of meeting by e-mail.

2.4 Although the list of matters for which by-laws may be made is not limited or exhaustive, particular attention must be given to the effect of section 43(4) of the SSMA which states that a by-law has no force or effect to the extent that it is inconsistent with the SSMA, any other Act or the law.

Restrictions on by-laws

2.5 Some examples of by-laws that have fallen foul of section 43(4) of the SSMA include:

- by-laws which prohibit or restrict the devolution of a lot or a transfer, lease, mortgage, or other dealing relating to a lot (section 49(1) of the SSMA);
- by-laws amending or repealing an order made under Chapter 5 of the SSMA except by a by-law made in accordance with an unanimous resolution of the owners corporation in general meeting (section 49(2) of the SSMA);
- by-laws prohibiting or restricting persons under 18 years of age occupying a lot (section 49(3) of the SSMA);
- by-laws prohibiting or restricting the keeping of guide dogs or hearing dogs by an owner or occupier of a lot or the use of a guide dog or hearing dog on common property (section 49(4) of the SSMA);
- by-laws prohibiting or restricting the keeping of an “assistance animal” within the meaning of section 5 of the *Companion Animals Act 1998* (NSW) e.g. hearing assistance dogs and any other animal trained to assist a person to alleviate the effect of a disability (subsection 9(2) of the *Disability Discrimination Act 1992 (Cth)*);
- by-laws prohibiting an owner or occupier of a lot from carrying on their business within a lot where development consent has been granted by Council (section 28 of the EPAA);
- by-laws that would have the effect of varying or excluding the operation of a provision of the SSMA (section 245 of the SSMA);
- by-laws that conflict with any other Act or law (section 43(4) of the SSMA);

- if a strata scheme is part of a community title scheme, then by-laws cannot be made that conflict with the strata management statement (section 58 of the SSMA); and
- by-laws cannot be made in the strata scheme's initial period if it benefits or affects some but not all lot owners (section 50 of the SSMA).

Who is required to comply with by-laws?

2.6 Under section 44(1) of the SSMA, the by-laws for a strata scheme bind:

- the owners corporation;
- the owners of a lot in the strata scheme;
- mortgagees or covenant chargees in possession (whether in person or not);
- the lessees of a lot; and
- the occupiers of a lot.

Note that a visitor and invitee of an owner, occupier or lessee of a lot are not bound by the strata scheme's by-laws.

2.7 Section 44(2) of the SSMA states that each lease of a lot or common property contains an implied covenant by the lessee to comply with the by-laws of the strata scheme.

2.8 Further, the provisions of section 46 of the SSMA place obligations on lessors in freehold strata schemes and sub-lessors in leasehold strata schemes to provide their lessees with a copy of the by-laws and any strata management statement affecting the lot or common property within 7 days after the lessee becomes entitled to possession of the lot or common property.

2.9 When acting for lessors, practitioners should note the following matters:

- copies of any amended by-laws must be given to a lessee or sub-lessee in the case of leasehold strata schemes within 7 days after the amendment has been registered at Land and Property Information NSW (section 46(3C) of the SSMA);
- the modes of service of by-laws, strata management statements or their amendments (section 46(4) of the SSMA);
- a maximum penalty of 1 penalty unit, which currently equates to \$110.00, apply for failure to comply with section 46 of the SSMA; and
- if the strata scheme is part of a community scheme and the lessee or sub-lessee is the owner of a lot in the strata scheme, lessors are exempted from their obligations in section 46 of the SSMA (section 46(5) of the SSMA).

3. WHICH BY-LAWS APPLY TO A STRATA SCHEME?

3.1 The starting point is to determine the date of registration of the strata plan. The date of registration can be found on the first page of a copy of the registered strata plan. The following is an excerpt from strata plan no. 5523 showing the date of registration of the strata plan being 4 August 1971.

STRATA PLAN 5523	
Registered:	 4/8/1971
C.A.:	N ^o 552 of 8-6-1971
Ref Map:	Warringah Sh. 73
Last Plan:	F.P. 384129 F.P. 951301 (D.P. 1376 [#])
THIS STRATA PLAN NOW CONTAINS 5 SHEETS	

3.2 Once you have determined the date of registration of the strata plan, you will then know whether or not the strata plan was registered prior to 1 July 1997 or after 1 July 1997. This key date will guide you to working out which by-laws apply to a strata scheme. I have prepared the following table summarising which by-laws apply to a strata scheme.

Date	Applicable By-laws
Strata plans registered prior to 1 October 1974	By-laws 1 to 29 of the STA applicable to strata plans registered prior to 1 October 1974 are not binding or enforceable: s42(2) of the SSMA. However, additions or amendments to those by-laws will be binding so far as they are capable of application to the current by-laws of the scheme.
Strata plans registered prior to 1 July 1997	<p>The following by-laws apply to strata plans registered before 1 July 1997:</p> <ul style="list-style-type: none"> (a) By-laws 1 to 19 listed in Schedule 1 of the SSMA: s42 of the SSMA; (b) By-laws added to by-laws 1 to 19; (c) By-laws added to by-laws 1 to 29 of Schedule 1 of the STA; (d) Any new by-laws amending, adding to or repealing the by-laws in (a), (b) and (c) above made before or after 1 July 1997 passed by the owners corporation in general meeting by special resolution and registered at LPI.
Strata plans registered after 1 July 1997	<p>The following by-laws apply to strata schemes registered on or after 1 July 1997:</p> <ul style="list-style-type: none"> (a) Developer by-laws registered with the strata plan; <u>OR</u> (b) Model by-laws: <ul style="list-style-type: none"> (i) for strata schemes registered before (but not including) 1 September

	<p>2005, the model bylaws contained in the <i>SSMR1997</i>; and</p> <p>(ii) for strata schemes registered on and after 1 September 2005, the model by-laws in Schedules 1 to 6 of the <i>SSMR2005</i>; and</p> <p>(iii) any new by-laws added to the strata scheme after 1 July 1997;</p> <p>(iv) any registered amendments or repeals made to the by-laws in (a) and (b) above.</p>
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4. MODEL BY-LAWS

4.1 The law changed for strata schemes registered after 1 July 1997 permitting Developer By-Laws. From this date, the developer (original owner) could also choose to adopt the model by-laws contained in the regulations to the SSMA instead of the Developer By-Laws.

4.2 The following table summarises which model by-laws apply to a strata scheme.

Date	Applicable By-laws
Strata plans registered prior to (but not including) 1 September 2005	<p>The model by-laws contained in Schedule 1 to the <i>SSMR1997</i>. There are 6 modules of by-laws contained in Schedule 1 dealing with:</p> <p>(a) residential strata schemes</p> <p>(b) retirement village strata schemes</p> <p>(c) industrial strata schemes</p> <p>(d) hotel/resort strata schemes</p> <p>(e) commercial/retail strata schemes</p> <p>(f) mixed use strata schemes</p>

Strata schemes registered on and after 1 September 2005	The model by-laws contained in Schedule 1 to 6 of the SSMR2005
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5. EXCLUSIVE USE AND SPECIAL PRIVILEGE BY-LAWS

Introduction

- 5.1 Exclusive use or special privilege by-laws are contractual and not proprietary rights (see *Northwind Pty Limited v The Proprietors Strata Plan No. 3143* (1981) 2 NSWLR 809). As these rights are not proprietary rights, practitioners should be aware of the limitations available to owners of these rights, e.g. if the owners corporation wanted to retain rights to a common property courtyard area for the purposes of granting a lease to a commercial lot owner, it is not possible to grant a lease over an exclusive use area.

Nature of Exclusive use and special privilege by-laws

- 5.2 Exclusive use by-laws and special privilege by-laws are made under section 52 of the SSMA.
- 5.3 Sections 51 and 52 of the SSMA states:

“51 Application of Division

(1) This Division applies to a by-law conferring on the owner of a lot specified in the by-law, or the owners of several lots so specified:

- (a) a right of exclusive use and enjoyment of the whole or any specified part of the common property, or*
- (b) special privileges in respect of the whole or any specified part of the common property (including, for example, a licence to use the whole or any specified part of the common property in a particular manner or*

for particular purposes), and to a by-law that amends or repeals such a by-law.

(2) This Division does not prevent an owners corporation making a by-law in accordance with section 54 of the Community Land Management Act 1989”.

52 How does an owners corporation make, amend or repeal by-laws conferring certain rights or privileges?

(1) An owners corporation may make, amend or repeal a by-law to which this Division applies, but only:

(a) with the written consent of the owner or owners of the lot or lots concerned and, in the case of a strata leasehold scheme, the lessor of the scheme, and

(b) in accordance with a special resolution.

(2) A by-law to which this Division applies may be made even though the person on whom the right of exclusive use and enjoyment or the special privileges are to be conferred had that exclusive use or enjoyment or enjoyed those special privileges before the making of the by-law.

(3) After 2 years from the making, or purported making, of a by-law to which this Division applies, it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed.”

5.4 These by-laws can give a lot owner or group of lot owners (but not occupiers) special rights over common property. Those rights can be in the nature of privileges that simply allow things to be done to or on common property that would or might otherwise be in breach of the SSMA or the by-laws for the strata scheme

or actually give a right to exclusively use parts of the common property to the exclusion of the strata scheme, other lot owners or lot occupiers.

5.5 There are not many restrictions on these by-laws. These by-laws will continue after changes to the ownership of lots.

5.6 It is essential that these by-laws:

- (a) identify the lots concerned to specify who receives rights and obligations;
- (b) identify the common property over which the rights exist to ensure certainty of effect;
- (c) specify whether the owners corporation will be responsible for the maintenance of, and keeping in a state of good and serviceable repair, the common property that is the subject of the by-law or whether that obligation is transferred to the lot owner/s concerned in the by-law to avoid doubt about that responsibility;
- (d) include appropriate conditions about the exercise of the rights to facilitate orderly implementation and management; and
- (e) in appropriate cases (e.g. exclusive use by-laws granting exclusive use to a roof space), include appropriate conditions about the lot owner/s obligation to pay compensation to the owners corporation for the grant of the rights.

5.7 These by-laws must also have the written consent from the owners of the lots concerned. Since the NSW Supreme Court case of *Young & 1 Ors v The Owners SP3529 & 2 Ors [2001] NSWSC1135 (11 December 2001)*, there is some doubt about who must give that consent and more detailed consideration and advice is often required when making this kind of by-law and, in some cases, all lot owners must give written consent to make these kind of by-law.

Restrictions on making exclusive use and special privilege by-laws

- 5.8 Practitioners should be aware of the following restrictions on making exclusive use and special privilege by-laws:
- (a) an exclusive use or special privilege by-law cannot be made in the initial period of the strata scheme (section 50 of the SSMA but note the exception in section 56 (now repealed) in relation to parking motor vehicles on common property if the local council has given written approval to the making of the by-law);
 - (b) any such by-law may only be made, amended or repealed with the written consent of the owner or owners of the lot or lots concerned and in the case of a leasehold strata scheme, the lessor of the scheme (section 52(1)(a) of the SSMA);
 - (c) any such a by-law may only be made, amended or repealed by the owners corporation in general meeting by way of a special resolution;
 - (d) by-laws that would have effect of avoiding a provision of the SSMA (section 245 of the SSMA); and
 - (e) by-laws that conflict with any other Act or law (section 43(4) of the SSMA).

Section 65A of the SSMA

- 5.9 Practitioners should also familiarise themselves with section 65A of the SSMA relating to changes to common property. Section 65A of the SSMA became law on 7 February 2005. It enables an owners corporation or an owner of a lot to take any of the following action for the purposes of improving or enhancing common property:
- (a) adding to the common property;
 - (b) altering the common property; or

(c) erecting a new structure on the common property.

5.10 The reason section 65A is significant dealing with by-laws is that if the alterations or additions are to be made by an owner of the lot, and the ongoing maintenance of that altered part of the common property is to be the responsibility of that owner, the special resolution allowing the owner of the lot to take that action in relation to the common property has no effect unless the owners corporation passes a by-law to provide for the maintenance of the common property by that owner, and the owners corporation so makes the by-law.

5.11 Prior to section 65A of the SSMA becoming law, special privilege and exclusive use by-laws were a mechanism used for permitting alteration to common property.

5.12 In practice, it is quite common to draft a hybrid by-law pursuant to both section 65A and 52 of the SSMA. For example, the by-law could transfer to the owner the obligation of ongoing maintenance of the altered part of the common property under section 65A of the SSMA and transfer to the owner the obligation to maintain and keep in a state of good and serviceable repair the exclusive use area (as defined) and the works (as defined) under section 52 of the SSMA.

5.13 Section 65A of the SSMA is reproduced below:

“65A Owners corporation may make or authorise changes to common property

(1) For the purpose of improving or enhancing the common property, an owners corporation or an owner of a lot may take any of the following action, but only if a special resolution has first been passed at a general meeting of the owners corporation that specifically authorises the taking of the particular action proposed:

(a) add to the common property,

(b) alter the common property,

(c) erect a new structure on the common property.

(2) A special resolution that authorises action to be taken under subsection (1) in relation to the common property by an owner of a lot may specify whether the ongoing maintenance of the common property once the action has been taken is the responsibility of the owners corporation or the owner.

(3) If a special resolution under this section does not specify who has the ongoing maintenance of the common property concerned, the owners corporation has the responsibility for the ongoing maintenance.

(4) A special resolution under this section that allows an owner of a lot to take action in relation to certain common property and provides that the ongoing maintenance of that common property after the action is taken is the responsibility of the owner has no effect unless:

(a) the owners corporation obtains the written consent of the owner to the making of a by-law to provide for the maintenance of the common property by the owner, and

(b) the owners corporation makes such a by-law.

(5) A by-law made for the purposes of this section:

(a) may require, for the maintenance of the common property, the payment of money by the owner concerned at specified times or as determined by the owners corporation, and

(b) must not be amended or repealed unless a special resolution has first been passed at a general meeting of the owners corporation and the

owners corporation has obtained the written consent of the owner concerned.

(6) The provisions of sections 52 (3), 54 (2) and (3) and 55 apply to a by-law made for the purposes of this section in the same way as those provisions apply to a by-law to which Division 4 of Part 5 of Chapter 2 applies.”

6. MATTERS TO CONSIDER WHEN DRAFTING EXCLUSIVE USE AND SPECIAL PRIVILEGE BY-LAWS

6.1 Before embarking upon drafting these by-laws, practitioners should obtain access to copies of the following documents and be familiar with their contents:

- (a) the registered strata plan for the strata scheme;
- (b) any strata plan/s of subdivision for the strata scheme;
- (c) the existing by-laws applicable to the strata scheme;
- (d) all change of by-laws registered on the owners corporation's common property certificate of title;
- (e) an up-to-date common property certificate of title search; and
- (f) a title search of the lot/s.

6.2 The registered strata plan will assist practitioners locate the area of common property over which exclusive use or special privilege rights are to be granted. I recommend that practitioners also review any registered strata plan/s of subdivision on the common property title as the layout/boundaries of the common property in the scheme may have changed since the registration of the strata plan.

6.3 The purpose of obtaining copies of the strata plan's existing by-laws including all change of by-laws registered on the common property title is to check that the

proposed exclusive use or special privilege by-law will not interfere with another lot owner or owners pre-existing exclusive use rights/special privileges over a specified part of common property. It will also assist practitioners work out the sequence of numbering of a new or changed by-law.

- 6.4 Practitioners should identify the lots concerned to specify which lot owner/s receives the rights and obligations under the by-law. Never assume that the lot number is the same as the unit number as they can differ in some schemes. It is best to check with the strata managing agent for the strata scheme.
- 6.5 Great care needs to be taken when specifying which part or parts of the common property to which a lot owner will have exclusive use and enjoyment. For example, if the owners corporation is granting an owner the right of exclusive use and enjoyment over a common property courtyard area adjoining the owner's lot, I recommend having a sketch plan attached to the by-law identifying the hatched area and specifying the upper and lower stratum limits of the exclusive use area.
- 6.6 Care also needs to be taken when stating in the by-law whether the owners corporation will be responsible for the maintenance of, and keeping in a state of good and serviceable repair, the common property that is the subject of the by-law or whether that obligation is transferred to the lot owner/s concerned in the by-law to avoid doubt about that responsibility.
- 6.7 An example definition of an exclusive use area taken from a by-law is as follows:

***“Exclusive Use Area”** means the common property located in the hatched area on the Plan including, but not limited to, the driveway and paved areas upon and subject to the conditions of this by-law.*

- 6.8 Example wording limiting the upper and lower stratum of the exclusive use area found on a sketch plan is as follows:

“The hatched area is limited in height to 2 metres below and 5 metres above the upper surface of the floor of the adjoining lot except where covered.”

7. COMMON TRAPS ENCOUNTERED WHEN DRAFTING BY-LAWS AND USEFUL TIPS ON HOW TO AVOID THEM

7.1 Strata schemes and their solicitors often encounter the following traps when drafting by-laws:

- (a) **Numbering** - often the numbering of a new or changed by-law is not considered when making or registering the by-laws leading to gaps or duplication. Although not necessarily critical to validity, misnumbering can lead to a lot of confusion when using or enforcing the by-laws. Therefore, having copies of all change of by-laws will assist to avoid these problems.
- (b) **Repealing old by-laws** – often making new by-laws involves repealing old by-laws that are redundant or inconsistent with the new by-laws. If the repealed and continuing old by-laws are not well identified there then can be confusion about which by-laws continue to operate.
- (c) **Consents from lot owners** – if by-laws under section 52 or section 65A of the SSMA are being made then consent must be obtained, in writing, from the lot owner (or if more than one each of them) before the by-law is made. There is divergence of opinion as to when a by-law is made. Some critics take the view that a by-law is not “made” until it is registered at LPI NSW. Others take the view that a by-law is made when it is passed by special resolution of the owners corporation in general meeting. I take the view that a by-law is not made until it is registered at LPI NSW as that is when the by-law becomes legally enforceable. Practitioners should attempt to obtain the written consents from lot owners at or prior to the general meeting at which the by-law is to be considered and voted on.
- (d) **Exclusive Use Area** – failure to adequately specify the common property areas the subject of exclusive use rights can make the by-law invalid. Therefore, it is prudent to have a registered copy of the strata plan to identify the common

property area in question and sometimes it may be necessary to obtain the client's or strata managing agent's instructions to pin point the relevant areas.

- (e) **Deemed consent of a lot owner** – practitioners need to be aware of the effect of sections 65(4) and 145 of the SSMA. A by-law which purports to give an owners corporation the right to enter a lot owner's lot or part of their lot to carry out work without the occupier of the lot's consent may be invalid (see *Owners Corporation SP 65120 v Dewar (Strata & Community Schemes Division)* [2008] NSWCTTT 893 (31 March 2008).
- (f) **Description of the works** – the failure to properly define the scope of work/s an owner is permitted to carry out and to specify the common property areas affected by such works may invalidate the by-law. It is useful to ask the client/strata managing agent to provide you with all drawings, specifications, scope of works, including their location, etc, in relation to the proposed works to assist practitioners draft the definition of works under the by-law.
- (g) **Structural cubic space** – although this is beyond the scope of this paper I briefly should mention structural cubic space. Structural cubic space is common property (e.g any pipes, wires, cables or ducts that are not for the exclusive enjoyment of one lot) and practitioners should be careful not to accidentally grant a lot owner exclusive use and corresponding repair/maintenance obligations over such areas. It is unlikely that an owner taking on exclusive use and enjoyment of a common property roof space would want to take on the responsibility for maintaining any electrical, plumbing and other services benefiting other lots in the scheme or the structure of the roof.
- (h) **Lot owner** – the rights of exclusive use/special privilege can only be granted to a lot owner in the scheme.

8. CASE LAW UPDATE ON BY-LAWS

Section 65A of the SSMA

- 8.1 Practitioners should pay careful attention to the validity of by-laws that either purport to approve works to common property in a general sense or that allow approval for works to be given by the executive committee.
- 8.2 *In Stolfa v Hempton* [2010] NSWCA 218 (2 September 2010), Allsop P stated at paragraph 94:

“[94] The requirement imposed by s 65A for specific authorisation of the taking of the particular action proposed does not mean that such authorisation must be found in a single resolution, nor that it relate to particular plans, nor that it admit of no variation in implementation. It means that a general authorisation to alter common property will not suffice. But a resolution authorising enclosure of a particular verandah is a specific authorisation of particular action, even if it does not specify the precise plans and building materials to be used.”

- 8.3 Accordingly, works caught by section 65A of the SSMA must first be approved by special resolution at a general meeting or a number of such resolutions. Further, a special resolution under section 65A must be sufficiently specific in relation to the authorisation and sufficiently particular in relation to the works proposed.

Section 65A and section 52 of the SSMA by-laws – Compulsory Strata Managing Agent – Consent to By-Laws

Jennifer Elizabeth James v The Owners Strata Plan No. SP 11478 (No 4) [2012] NSWSC 590 (4 June 2012).

- 8.4 The strata scheme was subject to the appointment of a compulsory strata managing agent under section 162 of the SSMA.

8.5 One of the issues for consideration before the Supreme Court of NSW was whether a compulsory strata managing agent could give consent under section 52 of the SSMA to the making of such a by-law on behalf of a lot owner concerned. The Supreme Court held that a compulsory strata manager could not and also held the by-laws to be invalid. The relevant sections of the judgement are reproduced below:

8.6 Ball J stated at paragraphs 93 to 95 of his judgement:

“93. When a lot owner gives consent under s 52, the lot owner is not giving that consent as an organ of the owners corporation. Rather, the lot owner is giving that consent in a personal capacity. The requirement of consent is necessary because that owner's personal rights will be affected by the by-law. Under s 162 of the SSM Act, Mr Anderson is given the powers of the owners corporation, the executive committee and office bearers of the executive committee. He is not given any of the powers given to an individual lot owner under the Act. Consequently, his purported consent on behalf of individual lot owners is ineffective.

94. Section 52 of the SSM Act provides that the owners corporation may "make" a by-law under that section "but only" with the written consent of the owner or owners of the lot or lots concerned. The by-law is made by the owners corporation, but a pre-condition to making the by-law is the required consent. In my opinion, the owners corporation "makes" a by-law when it passes a valid resolution adopting the by-law in accordance with the relevant requirements of the SSM Act. That conclusion is supported by s 52(3) which provides for a conclusive presumption that "all conditions and preliminary steps precedent to the making of the by-law" were complied with after two years. Section 52(3) draws a distinction between the making of the by-law and the conditions and preliminary steps precedent to the making of the by-law. The use of the words "preliminary" and "precedent" indicate that those steps are steps to be taken before the making of the by-law. One such step must be the obtaining of written consent. Section 52(3) is saying (among

other things) that that condition or preliminary step precedent is conclusively presumed to have taken place if no challenge is made to the by-law within two years.

95. *In my opinion, there is also a practical reason for interpreting s 52 as requiring written consent before a resolution is passed. That reason is that lot owners may well want to know whether written consent is forthcoming before voting on the resolution. The powers conferred by s 52 cannot operate any differently because they are being exercised by Mr Anderson under s 162 rather than by the owners corporation."*

By-laws and Strata Management Statements

- 8.7 In *Italian Forum Limited v Owners - Strata Plan 60919* [2012] NSWSC 895 (26 July 2012), White J upheld the validity of a strata management statement that provided for the levying of \$60,000 annual contributions for "promotional levies". White J stated at paragraphs 48 to 53:

"48. However, a strata management statement has no effect to any extent to which it is inconsistent with "any other Act or other law" (s 28W(5)). The learned editors of the CCH Conveyancing and Property Law New South Wales Strata and Community Titles commentary say (at [3-127]) that this includes a by-law for a strata scheme in the building concerned. I think that is right. I think a by-law, though limited in its application to the owners' corporation and lot owners and persons who claim title through them (Strata Schemes Management Act, s 44), is nonetheless a law (Gosling v Veley (1847) 7 QB 406 at 451; and London Association of Ship Owners and Brokers v London and India Docks Joint Committee [1892] 3 Ch 242 at 252.) But, with respect to the decision of Patten AJ, I do not see why by-laws could not be made to give effect to the obligations in the strata management statement for lot owners to pay promotional levies. At para [20] of his judgment set out above, Patten AJ stated that by-law 11 was not authorised by ss 43 or 47, but did not give reasons for that conclusion.

49. *Section 43 provides that a by-law can be made in relation to, amongst other things "matters appropriate to the type of strata scheme concerned." Section 47 entitles an owners' corporation in accordance with a special resolution to make by-laws for, amongst other things, the purpose of the administration, use and enjoyment of the lots, or the lots and common property, for the strata scheme.*
- 50 *These powers are not to be narrowly confined (see *White v Betalli* [2006] NSWSC 537; (2006) 66 NSWLR 690 and on appeal *White v Betalli* [2007] NSWCA 243; (2007) 71 NSWLR 381). The type of strata scheme concerned in the present case is that the commercial strata scheme is part of a wider development involving a car park, a piazza and residential apartments. One would have thought that matters appropriate to the participation of the commercial strata scheme in that form of development are matters for which by-laws could be made. I think there is a serious question as to whether his Honour was correct in his conclusion as to the scope of ss 43 and 47. His Honour was of the view that the Strata Schemes Management Act did not permit the levying of promotional levies. If that is so, I do not see how that consideration necessarily limits the matters that can be dealt with in the strata management statement that is enforceable against the lot owners directly under s 28W of the Strata Schemes (Freehold Development) Act.*
- 51 *The Strata Schemes Management Act provides for the raising of levies to be applied to the administration fund or to the sinking fund. With respect, it is not obvious that a by-law could not be made under ss 43 or 47 that provided for the levying of other contributions. But in any event, moneys can be raised to be applied to the administrative fund for, amongst other things, the meeting of "other recurrent expenses". As presently advised I do not see why that could not extend to levies properly raised pursuant to a strata management statement.*
- 52 *His Honour also considered that by-law 11 was invalid because it was not in conformity with s 78(2) of the Strata Schemes Management Act. Again, with respect, it is not clear to me why that was said to be so. But assuming that to*

be so, there is no reason the first defendant could not make a by-law that conformed with s 78.

53 *For these reasons, I would not accept the argument advanced that the amendments to the strata management statement were inconsistent with the legislative scheme in either the Strata Schemes Management Act or the Strata Schemes (Freehold Development) Act.”*

9. ABOUT THE AUTHOR

Michael Pobi commenced his career as a law clerk with Goldrick Farrell Mullan Lawyers, Sydney in 2001 practising in the areas of common law, public liability and insurance law.

At the end of his clerkship in 2003, Michael worked as a solicitor for a number of small to medium sized law firms practising in the areas of corporate/commercial law, property law, probate, wills and estates and commercial litigation.

With a passion for property law and commercial litigation and the desire to specialise, Michael joined Andreones Lawyers in 2008 and had the opportunity to work under and be mentored by Francesco Andreone. At Andreones Lawyers, Michael practised exclusively in the areas of strata and community title law, strata and property litigation, Land and Environment Court litigation, by-laws and levy recovery.

Following the sale of Andreones' business in 2010, Michael joined Bannermans Lawyers as an Associate lawyer and continued practising in the above areas of law including *Home Building Act 1989* claims.

On 10 July 2012, Michael founded Pobi Lawyers. Michael continues to practise exclusively in the areas of strata and community title law, strata and property litigation, Land and Environment Court litigation, CTTT disputes, by-laws and debt recovery.

Clients and fellow strata lawyers have come to appreciate Michael for his expert insight and assistance in resolving strata scheme disputes between owners corporations, executive committees, strata managers, councils and lot owners and the drafting of complex exclusive use and special privilege by-laws.

Michael's clients include strata managing agents, owners corporations, property professionals, executive committees, lot owners, solicitors and accountants.

Michael is a regular presenter and lectures at seminars to peer group bodies in his practice areas. He also has a modest following on Twitter www.twitter.com/PobiLawyers where he regularly tweets legal updates in his practice areas.

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